In the Supreme Court of the

OCTOBER, 1898 TERM.

No. 820.

THE FAIRPORT, PAINESVILLE AND EASTERN RAILROAD COMPANY,
Petitioner,

vs.

MAYER F. MEISSNER,
Respondent.

BRIEF FOR PETITIONER.

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INDEX.

The Case 1

The Question 2

The Facts 2

Statement of the Case 5

Assignments of Error 6

Argument 7

I. Summary 7

II. The Safety Appliance Act 7

III. Error of Court of Appeals Prejudicial 12

A. Last Clear Chance 13

2. Contributory Negligence Established 14

3. Error Not Cured 15

Conclusion 15

Appendix A—Complete Text of Act and Amendment, and Order of Interstate Commerce Commission .. 16

Appendix B—Excerpts from Testimony 22

Authorities Cited.

The B. & O. Railroad Company vs. Goodman, Admrx., 275 U. S. page 66 14

The Baltimore & Ohio Southwestern Railway Co. vs. Cox, Admr., 66 O. S. 276 11

The C. A. & C. Ry. Co. vs. Workman, Admr., 66 O. S. 509 12

The Cleveland Railway Company vs. Masterson, 126 O. S. 42 ..... 13, 15

Davis, Agent, etc. vs. Wolfe, 263 U. S. 239 at page 245 where the *Conarty, Lang* and *Layton* cases are reviewed 11

Grand Rapids, etc. Ry. Co. vs. U. S., 249 Federal Reporter 650 (Circuit Court of Appeals, Sixth Circuit, Feb. 16, 1918) 10

Hannan, Admr. vs. Ehrlich, 102 O. S. 176 11

Lang vs. New York Central R. Co., 255 U. S. 458 11

Louisville & Nashville Railroad Company vs. Layton, 243 U. S. 617 11

L. S. & M. S. Railway Co. vs. Harris, Admr., 13 Ohio Cir. Dec., 400 12

The Pennsylvania Rd. Co. vs. Rusynik, 117 O. S. 530 .. 14

Penn. R. Co. vs. Swartzel, 17 Fed. Rep. (2nd) 869 13

Pittsburgh, et al., Railway Co. vs. Bingham, 29 O. S. 364 11

Schell vs. DuBois, Admr., 94 O. S. 93, at page 107 11

St. Louis Iron Mtn. & So. Ry. Co. vs. McWhirter, 229 U. S. 265 at page 276 15

St. Louis & San Francisco Railroad Co. vs. Conarty, Admx., 238 U. S. 243 ..... 10, 12

Virginia Ry. Co. vs. U. S., 223 Fed. 748, 751 10

Roberts Federal Liability of Carriers, Vol. 2, Sec. 718 10

Thornton's Federal Employers' Liability Act, Section 227 9

In the Supreme Court of the United States

OCTOBER, 1933 TERM.

No. 820.

THE FAIRPORT, PAINESVILLE AND EASTERN RAILROAD COMPANY,
Petitioner,

vs.

MAYME F. MEREDITH,
Respondent.

BRIEF FOR PETITIONER.

THE CASE.

This case comes into this Court by reason of the granting of a Writ of Certiorari (Record, page 360) to the Court of Appeals of the State of Ohio, 7th Judicial District, being the highest court of said State in this action, the Supreme Court of Ohio having denied an application for an order to certify the record of the said Court of Appeals for review. (Record, page 358.)

The case was tried originally in the Common Pleas Court of Lake County, Ohio, and was an action to recover damages for personal injury to the driver of an automobile struck by a train at a highway crossing.

The trial to a jury resulted in a verdict for the plaintiff, (Respondent) and judgment was rendered thereon (Record, pages 344-5), which judgment was affirmed by the Court of Appeals. (Record, page 347.) The opinion in the Court of Appeals was not reported at the time petition for Writ of Certiorari was filed in this Court, but a certified copy

thereof appears in the record at pages 348 to 357. Since that time advance sheets containing the opinion have appeared in the Ohio Bar Association Report Vol. VII, No. 1, and the case will be reported later in 46 Ohio Appellate Reports, page 457.

THE QUESTION.

The question is: Does the Federal Safety Appliance Act and orders issued thereunder by the Interstate Commerce Commission, requiring that not less than 85% of the cars of a train moving interstate traffic shall be operated with power or train brakes, impose a duty upon a railroad to a traveler in an automobile on the public highway?

THE FACTS.

The defendant below (Petitioner) is a short line railroad with a switch line of about 2 miles running from the interchange of the New York Central Railroad to the Village of Fairport, furnishing switching facilities to several industries.

On the afternoon of July 19, 1929, a switch engine of the defendant below started from said interchange with 32 cars in interstate traffic enroute to Fairport Village. About 1½ miles from the interchange the railroad intersected a public highway at grade, where the accident occurred. The intersection was approximately at right angles. At that point there was a slight down grade on the railroad, and a very slight up grade on the highway which was paved to a width of 18 feet. The engine and tender were operated by air brakes, but the air hose was not coupled between any of the cars. It is impracticable in switching movements to couple the air because of the difficulty in cutting off cars so coupled. The only time when the air hose could have been coupled was while the cars were at the New York Central

interchange before the movement commenced, about one-half hour prior to the accident.

The day was clear and the pavement dry. The train approached the crossing from the East going toward the West at the rate of about 10 miles per hour. The plaintiff (Respondent) was driving South operating a Packard sedan, which she was accustomed to drive, and was accompanied by her daughter, who was sitting at her right. She was familiar with the railroad crossing, having driven over it frequently for many years. The view to the East whence the train was approaching was obstructed by an apple orchard. When plaintiff was 200 feet from the crossing, she looked through the orchard to her left (East) but failed to see the train. (Record, pages 117-121.) *From that time on until she was actually upon the railroad tracks, she did not look in the direction from which the train was approaching and did not see the train until the instant she was struck.* (Record, pages 106-116-117-118.) The daughter did not look toward the East at all until just as the collision occurred. (Record, page 94.) Plaintiff's evidence was that when she was 52 feet distant from the North rail, she had an unobstructed view to the East along the railroad tracks for a distance of 52 feet, when 40 feet from the North rail she had an unobstructed view for a distance of 78 feet. (Record, pages 50-51.) The range of vision increased rapidly so that from a point 22 feet from the North rail, until she was struck, the view was entirely unobstructed. (Record, pages 255-256.)

Plaintiff testified that she was driving on the right side of the pavement (Record, page 117), that at a point 200 feet from the crossing she began to slow down, running for some distance 7 or 8 miles per hour and then as she neared the crossing she slowed down to 2 or 3 miles per hour maintaining that speed until the collision occurred. (Record, pages 91-92.) The front wheels of the automobile were

approximately at the South rail of the track and the rear wheels of the automobile were approximately at the North rail of the track at the moment of impact.

The engine drawing the train was in backward movement, the rear part of the tender first reaching the crossing and colliding with plaintiff's automobile. A full crew was in charge; the engineer was on the southerly side of the cab, and the fireman was on the northerly side, both looking in the direction in which they were moving. The head brakeman was riding on the footboard at the rear end of the tender, that being the part of the tender first to reach the crossing; the conductor and the rear brakeman were riding in a hopper car at the rear end of the train, no caboose being attached. As soon as the head brakeman and the fireman saw that the automobile was not stopping, they signalled the engineer to stop the train. (Record, pages 219-237-243); the engineer at once applied the air brakes on the engine and tender (Record, page 237), but could not apply the air brakes on the cars, none of the hose being connected; the fireman reached the car next to the engine and set the hand brake, but the train stopped before he had time to go further (Record, page 238); the head brakeman, after signalling for the stop, climbed up the rear end of the tender to avoid being struck (Record, page 220); the conductor and rear brakeman did not know there had been an accident until after the train came to a stop.

The automobile was pushed along the track in front of the tender for a distance of over 600 feet. The crankcase on the automobile was so damaged by the collision that oil gradually ran out and smeared one rail of the track for a long distance, and the other rail for a shorter distance. (Record, pages 222-223-241-267-280.) Twenty-three of the 32 cars were loaded with coal, making a heavy train for a switch engine to handle. After plaintiff's dangerous position was known, the crew did everything in its power to prevent injury to her.

STATEMENT OF THE CASE.

The plaintiff (Respondent) pleaded the Federal Safety Appliance Act, averring that the defendant (Petitioner) was negligent

> "in failing to obey the laws of the State and the United States which were then in full force and effect in reference to maintaining the use of air in and on said cars of said train which would have supplied full force for the application of all the brakes as aforesaid." (Record, page 8.)

The plaintiff offered evidence in support of that allegation, and the trial court charged that the failure of the railroad to connect the air to the 32 cars was negligence *per se*, and, if a proximate cause of the accident, would entitle the plaintiff to recover. (Record, pages 335-336.) The charge of the court in that respect was as follows:

> "The court therefore instructs you that the engine and thirty-two cars which the defendant was operating at this time, were in the eyes of the law a train and engaged in interstate commerce, and therefore subject to the law of the United States in that particular. The laws of the United States require a train so proceeding and having the legal status that this train had, to have at least 85 per cent of the cars on such train equipped with air brakes, so that by the use of air as applied through those brakes, in addition to the air brake on the engine, the train can be controlled by the engineer. It became, therefore, the duty of the defendant company in this case in starting this train of cars out to provide that the air brakes on at least 85 per cent of those cars should be in working order so that they could be controlled from the engine, and in addition to the air brake on the engine and tender itself; and the failure of the railroad company to so provide the equipment in the manner that it should be used to control, check or stop the progress of the train, would in the eyes of the law be negligence; and for the direct and proximate consequence of such neg-

ligence the defendant company would be liable—the burden of proof being upon the plaintiff to show by a preponderance of the evidence that such omission was the direct and proximate cause of the injury to the plaintiff in this case." (Record, pages 335-336.)

This case was taken on error to the Court of Appeals of the 7th Judicial District of Ohio, where the judgment was affirmed. The Court of Appeals in its opinion said:

"In the instant case * * * we do have a direct violation of a federal statute under which the defendant was required before leaving the interchange to connect at least eighty five per cent of the cars in the train for air, and because of that mandatory duty it must be conclusively presumed to have anticipated all consequences of its negligence, which responsibility continued present during all the time it operated the train in its defective condition. When, therefore, the collision happened it was an existing negligence which made it impossible to save the plaintiff from injury. In the instant case, at most, the plaintiff violated no rule except the natural law to use ordinary care for her own protection and the defendant violated a federal law enacted for the protection not only of railroad employes and passengers on railroad trains *but the public generally* who are brought in contact with railroads and who might be subjected to danger if such rules were not observed." (Italics ours.) (Record, pages 356-357.)

ASSIGNMENTS OF ERROR.

The Court of Appeals, Seventh Judicial District of Ohio, Lake County, erred:

(a) In affirming the judgment of the lower Court wherein that court held that the Safety Appliance Act inured to the benefit of the plaintiff below (Respondent);

(b) In holding that

"The defendant violated a Federal law enacted for the protection not only of railroad employes and

passengers on railroad trains but the public generally who are brought in contact with railroads and who might be subjected to danger if such rules were not observed." (Record, pages 356-7.)

(c) In sustaining the judgment of the lower Court.

ARGUMENT.

I.

SUMMARY.

(a) This is a case wherein a statute of the United States is asserted and wrongfully applied.

(b) The Federal Safety Appliance Act and the rule of the Interstate Commerce Commission made thereunder have no application to this case, and the finding of the court below to the contrary is erroneous.

(c) The Safety Appliance Act and the order thereunder applies to employes and passengers, but not to a traveler upon the public highway.

(d) The holding of the court below construing the violation of the Federal Safety Appliance Act as negligence *per se* deprived the defendant below (Petitioner) of the benefit of the doctrine of contributory negligence.

II.

THE SAFETY APPLIANCE ACT.

No cases in the Courts of the United States have been found where the provisions of the Safety Appliance Act have been applied for the benefit of any person except employees and travelers upon the railroad itself.

The passage of the original Safety Appliance Act was due largely to the efforts of President Harrison. In his first annual message to Congress he said:

"The attention of the Interstate Commerce Commission has been called to the urgent need of congres-

sional legislation for the better protection of the lives and limbs of those engaged in operating the great interstate freight lines of the country, and especially of the yardmen and brakemen." * * * "During the year ending June 30, 1888, over two thousand railroad employes were killed in service, and more than twenty thousand injured. It is competent, I think, for Congress to require uniformity in the constructions of cars used in interstate commerce, and the use of improved safety appliances upon such trains."

Again in his annual message of December 9th, 1891, he said:

"I have twice before urgently called the attention of Congress to the necessity of legislation for the protection of the lives of railroad employes, but nothing has yet been done." * * * "A law requiring of every railroad engaged in interstate commerce the equipment each year of a given per cent of its freight cars with automatic couplers and air brakes would compel an agreement between the roads as to the kind of brakes and couplers to be used, and would very soon and very greatly reduce the present fearful death rate among railroad employes."

The Safety Appliance Act was subsequently enacted by Congress and became effective, March 2, 1893. On March 2nd, 1903, an amendment was made fixing the minimum percentage (50%) of cars in a train required to have air brakes in operation, and authorizing the Interstate Commerce Commission to increase such minimum percentage. The complete text of the Act and the amendment referred to, and the order of the Interstate Commerce Commission made thereunder, whereby the minimum percentage was increased to 85%, is found in Appendix A to this brief. The Act was supplemented April 14, 1910, 36 Stat. at Large, 298, but not affecting the provisions relating to air brakes.

Having observed the purpose sought to be accomplished by President Harrison by these recommendations, to-wit: the better protection of the lives and limbs of railroad employees, let us now turn to the Act itself, to determine from its provisions the class of persons for whose benefit the legislation was enacted.

The title of the Act indicates its purpose, and is as follows:

> "An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes."

We realize that the title of an Act is no part of the Act itself, but it often is indicative of the purpose sought to be accomplished by the legislature. It is to be noted that the Act is one "to promote the safety of employes and travelers upon railroads." These are the only classes of persons named. "Travelers upon railroads" having been included, certainly travelers upon highways are excluded. "*Inclusio unius est exclusio alterius.*" Considering now the original Act, we find in Section I the requirement is, that a sufficient number of cars must be equipped with power or train brakes so "that the engineer on the locomotive drawing such train can control its speed *without requiring brakeman to use the common hand brake for that purpose.*" (Italics ours.) It is evident that the purpose was to protect the brakeman.

We quote from *Thornton's Federal Employers' Liability Act,* Section 227, as follows:

> "It is clear that the intention of Congress in the passage of the Safety Appliance Act, was to, in a measure, secure the safety of employes of railroads in moving cars in interstate commerce."

On this point another recognized authority says:

> "Whether the act exists for the protection of railroad employes other than trainmen, cannot, in the absence of controlling federal decisions upon that point, be authoritatively stated."
>
> *Roberts Federal Liability of Carriers,* Vol. 2, Sec. 718.

Other authorities to the same effect are:

> "New Mexico constitution providing that it shall be unlawful for any railroad corporation knowingly and wilfully to use and operate any defective car or locomotive, and that the railroad shall be liable to any employe injured through defect in any car, locomotive, or attachments, etc., relate exclusively to employes of railroad, and have no application in the case of other persons injured or killed through the negligence of a railroad."
>
> *Grand Rapids, etc. Ry. Co. vs. U. S.,* 249 Federal Reporter 650 (Circuit Court of Appeals, Sixth Circuit, Feb. 16, 1918);
>
> *Virginian Ry. Co. vs. U. S.,* 223 Fed. 748, 751.

We call the attention of the Court to the case of

> *St. Louis & San Francisco Railroad Co. vs. Conarty, Admx.,* 238 U. S. 243,

which was a case where the benefit of the Safety Appliance Act was denied even to an employee. We quote from the opinion at page ~~249~~ 250:

> "We are of opinion that the deceased, who was not endeavoring to couple or uncouple the car or to handle it in any way, but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit, and that the supreme court of the state erred in concluding that

Clay vs Atchison T. & S.F. Ry. Co.
210 S W Rep. 1072.

the safety appliance acts required it to hold otherwise."

The rule laid down in the case above mentioned was broadened in the case of

Louisville & Nashville Railroad Company vs. Layton, 243 U. S. 617,

so as to include all employees injured in the discharge of their duty, as a proximate result of the violation of the act. See also,

Lang vs. New York Central R. Co., 255 U. S. 455;

Davis, Agent, etc. vs. Wolfe, 263 U. S. 239 at page 241, where the *Conarty, Lang* and *Layton* cases are reviewed.

If we are correct in our interpretation of this Act, then the well known rule applies that the violation of a statutory duty is the foundation of an action in favor of such persons only as belong to the class intended by the legislature to be protected by such statute, and it follows that the plaintiff (Respondent) was not entitled to the benefit of the Safety Appliance Act.

"Negligence is the failure to comply with some duty imposed by law. But in order that an act of negligence may be the predicate of any action, it is necessary that the duty should have been imposed for the benefit of the person injured and that the violation of the duty be the proximate cause of the injury."

Schell vs. DuBois, Admr., 94 O. S. 93, at page 107;

Hannan, Admr. vs. Ehrlich, 102 O. S. 176;

Pittsburgh, et al., Railway Co. vs. Bingham, 29 O. S. 364;

The Baltimore & Ohio Southwestern Railway Co. vs. Cox, Admr., 66 O. S. 276;

St. Louis & S. F. R. Co. vs. Conarty, 238 U. S. 243, at page 249.

"The failure to give statutory signals, by bell and whistle, of the approach of a train to a highway crossing cannot be a ground for recovery in an action for wrongful death where it appears that the train, after passing the crossing and several hundred feet therefrom, struck the decedent as she attempted to cross the tracks on the private grounds of the company, where people were in the habit of crossing."

L. S. & M. S. Railway Co. vs. Harris, Admr., 13 Ohio Cir. Dec., 400.

Under Statutes requiring crossing signals to be given, it was held that:

"Revised Statutes, Sections 3336 and 3337 are intended for the protection of such persons only as are crossing the track or are about to do so; and they do not inure to the benefit of persons who are on the track and not at a crossing. *Railroad Co. vs. Depew*, 40 Ohio St., 121, approved and followed."

The C. A. & C. Ry. Co. vs. Workman, Admr., 66 O. S. 509.

It is our contention, that since the plaintiff was not a member of the class for whose protection the statute was passed, the railroad's failure to operate its cars with air brakes was not, *as a matter of law*, negligence as to her, and the decision of the Court of Appeals, therefore, was erroneous.

III.

ERROR OF COURT OF APPEALS PREJUDICIAL.

The holding of the trial court and the Court of Appeals upon the Last Clear Chance Doctrine based upon the Federal Safety Appliance Act deprived the railroad company of its defense of contributory negligence which was clearly established in this case.

1. Last Clear Chance.

The trial court charged the jury that the Last Clear Chance Doctrine was applicable to the case. (Record, pages 335-336.) The Court of Appeals upheld this instruction *upon the ground that the pre-existing negligence of the Railroad Company in failing to couple the air hose at the interchange before the movement of the train commenced was a continuing negligence making this doctrine applicable.* (Record, pages 356-357.) The court in so holding entirely ignored the fact that there was nothing that the crew could do by way of connecting this air hose *after* the dangerous position of plaintiff was discovered. No case has been found sustaining the holding of the court, except the Utah case cited in its opinion. All other reported decisions hold that the negligence must have occurred after plaintiff's peril was discovered.

> "Doctrine of last clear chance does not apply, unless danger is actually discovered, since whole theory of doctrine is based on and confined to conduct subsequent to discovery of danger."
>
> *Penn. R. Co. vs. Swartzel,* 17 Fed. Rep. (2nd) 869.

The Ohio rule is stated in the case of

> *The Cleveland Railway Company vs. Masterson,* 126 O. S. 42,

the first syllabus being:

> "Where a plaintiff, by his own fault, has caused himself to be placed in a perilous situation, he may recover under the rule of the 'last clear chance,' notwithstanding his negligence, if the defendant did not, after becoming aware of plaintiff's perilous situation, exercise ordinary care to avoid injuring him."

We call the attention of the Court to the fact that there was no claim of wanton or wilful negligence in this case.

2. Contributory Negligence Established.

The contributory negligence of the plaintiff was conclusively established by the testimony of herself and her daughter. It appears from their testimony that the plaintiff on two occasions only, looked toward the direction from which the train was coming, once at a point two hundred feet from the track when her view was obstructed by the orchard, and again when she was upon the railroad track and just as she was struck. Had she looked she must have seen the train approaching. Plaintiff's own evidence was that when she was 52 feet distant from the North rail, she had an unobstructed view to the East along the railroad tracks for a distance of 52 feet, when 40 feet from the North rail she had an unobstructed view for a distance of 78 feet. (Record, pages 50-51.) The range of vision increased rapidly so that from a point 22 feet from the North rail, until she was struck, the view was entirely unobstructed. (Record, pages 255-256.) The testimony on that point is set forth in Appendix B of this brief.

The law is well established as to the duty of a traveler upon the public highway when approaching a known railroad crossing.

> "One attempting to drive an automobile over a railroad crossing with which he is familiar is negligent so as to prevent recovery for his death by being struck by a train, where, when his view of the track is obstructed, he does not stop and look, and, if necessary leave the vehicle, to make sure that the crossing is safe."
>
> *The B. & O. Railroad Company vs. Goodman, Admrx.*, 275 U. S. page 66.

The Ohio rule is substantially the same.

The Pennsylvania Rd. Co. vs. Rusynik, 117 O. S. 530.

3. Error Not Cured.

The error complained of is not cured by any claim that the case might properly have been decided for the plaintiff upon an issue other than the application of the Safety Appliance Act.

St. Louis Iron Mtn. & So. Ry. Co. vs. McWhirter, 229 U. S. 265 at page 276,

> "Where a general verdict is rendered finding for the plaintiff, and the trial court errs in its instructions regarding the duty of the defendant under the last chance rule, the two issue rule cannot be relied on to uphold the verdict."

The Cleveland Ry. Co. vs. Masterson, 126 O. S. 42.

CONCLUSION.

The Court of Appeals having erred in holding that the Safety Appliance Act inured to the benefit of the plaintiff, a traveler upon the public highway, thereby depriving the defendant of the defense of contributory negligence, we respectfully submit the judgment should be reversed.

Respectfully submitted,

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APPENDIX A.

SAFETY APPLIANCE ACTS.

An Act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

Sec. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive-engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train brake system or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakeman to use the common hand brake for that purpose.

Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled, without the necessity of men going between the ends of the cars.

Sec. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of Section one of this act, it may lawfully refuse to receive from connecting lines of road or shipper any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and

readily interchange with the brakes in use on its own cars, as required by this act.

Sec. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

Sec. 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of draw bars for freight cars measured perpendicular from the level of the tops of the rails to the centers of the draw bars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the draw bars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

Sec. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits

to be brought by the United States district attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge, Provided, that nothing in this act contained shall apply to trains composed of four-wheeled cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs. (As amended April 1, 1896, 29 U. S. Stat. at L., 85, ch. 87.)

Sec. 7. That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this act.

Sec. 8. That any employe of any such carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

Approved, March 2, 1893, 27 U. S. Stat. at Large, 531, ch. 196.

An Act to amend an act entitled, "An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second,

eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six. (Public No. 133, approved March 2, 1903.)

Sec. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions and requirements of the Act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type, and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, or which are used upon street railways.

Sec. 2. That whenever, as provided in said Act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act the Interstate Com-

merce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

Sec. 3. That the provisions of this Act shall not take effect until September first, nineteen hundred and three. Nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States District Attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, shall, except as specifically amended by this Act, apply to this Act.

Approved, March 2, 1903, 32 U. S. Stat. at Large, 943, ch. 976.

ORDER OF THE INTERSTATE COMMERCE COMMISSION

JUNE 6, 1910.

IN THE MATTER OF REQUIRING AN INCREASE IN THE MINIMUM PERCENTAGE OF BRAKES

The Commission having under consideration the question of requiring an increase in the minimum percentage of power brakes to be used and operated on trains and railroads engaged in interstate commerce, as provided by section two of the Act of March 2, 1903, and it appearing to the Commission, after full hearing had on May 5, 1909, due notice of which was given all common carriers, owners and lessee engaged in interstate commerce by railroad in the United States, and at which time all interested parties were given an opportunity to be heard and submit their views, that to secure more fully the objects of the Act to promote the safety of employees and travelers on railroads, the minimum percentage of power-brake cars to be used in trains, as established by its order of November 15, 1905, should be further increased.

It is ordered, That on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85% of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake cars in every such train which are associated together with the 85% shall have their brakes so used and operated.

APPENDIX B.

1. Excerpts from the testimony of plaintiff's daughter, Lee Anna Meredith.

On Record, pages 91-92.

Q. At what speed did she drive after she headed out of her driveway down and coming to the railroad crossing?

A. Between twenty and twenty-five miles an hour.

Q. She started to slow down, did she, some time before getting to the railroad tracks?

A. Yes, sir.

Q. How close had she got to the railroad tracks before she started to slow down?

A. About two hundred feet.

Q. What did she do by way of slowing down?

A. Well, just gradually slowed down.

On Record, page 92.

Q. And from that point how did she operate the car, after she slowed down? Having slowed down somewhat, did she go at a uniform rate, or continue to go slower and slower as she got up to the point of the crossing?

A. I think she gradually slowed down.

Q. So, when you got up to the north rail of the track, how fast was the automobile going?

A. Just a few miles an hour.

Q. Can you tell the jury approximately how many?

A. About two or three miles an hour.

Q. Just barely moving?

A. Yes, sir.

Q. And for some little distance back you had been gradually going down to that speed?

A. Yes, sir.

Q. So that, back 20 or 25 feet from the crossing, how fast do you think your mother was driving the car that day?

A. Oh, about 7 or 8 miles an hour, probably.

On Record, pages 93-94.

Q. You saw at some time this tender that struck your automobile, did you?

A. Yes, sir.

Q. Where were you at that time with reference to the north rail of the track?

A. Right there.

Q. That was when you first saw the portion of the locomotive that was nearest you?

A. Yes, sir.

Q. Can you tell the jury how far it was from you when you first saw it,—from your automobile?

A. No, sir.

Q. Can you give us any idea?

A. It was right there.

Q. Practically together?

A. Yes, sir.

Q. Had you looked to the east at all before that, to your left?

A. Before I saw it?

Q. Yes.

A. No, sir.

Q. You had not looked to the east and so you did not see where your mother was looking, did you?

A. No, sir.

Q. And therefore you do not know whether she looked to the east or not,—I mean from your own knowledge?

A. No, sir.

Q. And then you say that was when the front wheels of the automobile in which you were riding was practically on the north rail?

A. Yes, sir.

Q. And you had not been looking to the east before that?

A. No, sir.

2. Excerpts from the testimony of the plaintiff.

On Record, pages 105-106.

Q. Now, after you went on down on the railroad tracks, you may state whether or not you reduced your speed?

A. I slowed down.

Q. After you got past the orchard give me your best judgment as to how fast you were going then?

A. I was practically stopped.

Q. Now, Mrs. Meredith, I understand you to say you knew of that crossing?

A. Yes, sir.

Q. And you knew of the orchard?

A. Yes.

Q. You know the physical situation there and have known it for a long time?

A. Yes, sir.

* * * * *

Q. When you looked to the left, what did you see, if anything, in the way of a train?

A. I saw a train right on the track, and we were right there at the same time.

On Record, page 114.

Q. On this occasion you started to slow down, I understood you to say in answer to Mr. Anderson, before you arrived at the track?

A. Yes, I did.

Q. You were going how fast before you started to slow down?

A. About 20 to 25 miles an hour.

On Record, page 115.

Q. Now, you were going 20 to 25 miles an hour. How far back from the railroad track did you start to slow down?

A. I cannot say exactly. I should judge around two hundred feet.

Q. When you were 200 feet back, from that time on you were reducing all the time?

A. Yes, sir.

On Record, page 116.

Q. When you came to the crossing, I think you said just before you went on it you thought you were going about two or three miles an hour?

A. Practically a stop.

Q. Didn't you say at the other hearing that you were going two or three miles an hour?

A. Yes; practically a stop.

On Record, page 116.

Q. That is not answering my question. Can you tell me whether after looking to the right you turned around to the other side and looked back towards the east?

A. I looked and turned my head back the other way.

Q. Now, at that time, when you turned back, as you say, the first you saw of this tender was just at the time that you were struck?

A. They were right there together, yes, sir.

Q. So, when you looked to the left, the first you saw of the tender was just as you were struck, is that right?

A. Yes; just at that time.

On Record, pages 116-117.

Q. With reference to when you first saw the tender was this question asked you the other day:—Question "Where were you at that time with reference to the railroad crossing," and was your answer "Right on the track"?

A. I think it was.

Q. And was this question asked you "You had not seen any part of this train until you were right there"; "as you say, right on the track," is that right?

A. I think so.

Q. Do you say or not that that was the fact?

A. That they were right there?

Q. Yes.

A. Yes, sir.

Q. Was your answer to that question that I have just read that you did not see any of it until you were right there on the track?

A. I did not see any train.

On Record, page 117.

Q. And the first time that you looked was when you looked to the right that you have told us about?

A. No; I glanced to the left first. There was an obstruction—the trees there on the left side, and then I glanced to the right again.

Q. When you glanced to the left first it was while the orchard was obstructing your view?

A. Yes, sir.

Q. And then the next time that you looked, you looked to the right and then back to the left as you have just described?

A. Yes, sir.

Q. Did that constitute the times that you looked?

A. Yes, sir.

On Record, page 118.

Q. You did not see that tender, even going at the rate of two or three miles an hour in time so that you could stop without being over on the track?

A. I did not see it until we were right together.

On Record, page 121.

Q. There is just one more question. In your testimony last week in your daughter's case, did you testify that the time that you first looked to see if the crossing was clear was as you estimated it, two hundred feet or more—perhaps two hundred feet?

A. I think probably I did.

Q. Is that correct?

A. Yes.